

Privy Council Appeal No. 72 of 1939
Appeal No. 21 of 1938

The Jagadamba Loan Company, Limited - - - *Appellants*

v.

Raja Shiba Prasad Singh and others - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 2ND DECEMBER, 1940

Present at the Hearing:

LORD ATKIN

LORD THANKERTON

SIR GEORGE RANKIN

[*Delivered by SIR GEORGE RANKIN*]

The controversy in this case has reference to 650 bighas of coal land in Mouza Jinagara in the district of Manbhum in Bihar. In these, the appellants, the Jagadamba Loan Company, Limited, are mortgagees of certain leasehold interests which were granted by the Jharia Raj as zemindar to one Charles Smith upon the terms of two kabulyats dated 24th April, 1907. By one of these instruments Charles Smith took settlement of the surface rights for 999 years at an annual rent of Rs. 650: by the other the sub-soil rights were settled with him for the same period upon certain terms as to payment of royalty which need not here be set out. The rent for the surface rights was secured by a provision that "the leasehold land remains wholly hypothecated for the amount of rent and the amount of rent will be treated as the first charge." As regards the sub-soil rights the provision was "that for the amount of royalty the leasehold land and the machineries remain wholly hypothecated. If I make default in payment of the amount of royalty you will be competent to realise the same by selling the leasehold land."

The appellants' mortgage is dated 4th February, 1920. It was executed by the lessee Charles Smith. It recited that several sub-leases had in the meantime been granted by him one being in favour of the Jinagara Coal Company, Limited. It provided that the appellants should from time to time make advances upon a cash credit loan account and that Charles Smith the mortgagor should repay the same with certain interest on the 4th February, 1923. Subject to a proviso for redemption it conveyed to the appellants all the estate and interest of the mortgagor including his right to rent and royalties from sub-leases. The mortgagor covenanted that during the subsistence of the security he would pay all rents, royalties, taxes, etc. and observe the covenants of the head leases. In case of the mortgagor's default in payment of the principal and interest when due the appellants were to be entitled to enter into possession of the mortgaged premises and receive the rents, issues

and profits thereof, and in case of the mortgagor's default in payment of the rents, royalties or taxes due in respect of the lands the appellants were to be at liberty to enter into possession without being accountable as a mortgagee in possession.

It is agreed that the appellants eventually collected certain rents and profits from sub-lessees of Charles Smith and in this sense entered into possession; but the dates and other particulars of the appellants' action do not appear from the record submitted to the Board. It is not suggested that the appellants at any time paid rent to the Jharia Raj in respect of the leasehold interests in mortgage to them.

The suit out of which this appeal arises was brought in the Court of the Subordinate Judge at Dhanbad on the 20th April, 1928. It was brought on behalf of the Raj as lessor against Charles Smith (the first defendant) as lessee and certain other parties as sub-lessees. The appellants were not originally impleaded: they were added as parties on 4th January, 1929, but took no steps to contest the suit until after it had resulted in a sale as hereafter mentioned. The plaintiff claimed large sums as due to the Raj for rent and royalty in arrear in respect of the 650 bighas, prayed that an account of the raisings of coal should be had to ascertain the sums due for royalty, claimed that the arrears were a first charge on the leasehold properties, and asked for enforcement of the charge by sale. Certain accounts having been taken as directed by the trial Judge on 14th June, 1929, a preliminary decree for sale was made on 9th December, 1929, and a final decree on 30th August, 1930. The sale took place on 25th June, 1931. After setting off the sale proceeds against the amount due to the Raj, a large sum remained due and unpaid, and on the 23rd June, 1934, application was made on behalf of the Raj under Order 34, r. 6, of the Civil Procedure Code for a personal decree for the deficiency against the estate of Charles Smith the lessee (who had died pending suit), against one of his sub-lessees, and against the appellants. The deficiency was said to amount to a lac of rupees.

This claim was resisted by the appellants who lodged an objection dated 28th July, 1934, maintaining that between themselves and the Raj as lessors there was neither privity of contract nor of estate.

The learned Subordinate Judge on 6th December, 1934, upheld the objection and refused to make a personal decree against the appellants, but on appeal the High Court at Patna (Terrell C.J. and Fazl Ali J.) reversed his decision and passed a decree on 18th February, 1938, against the appellants for the sums due to the Raj for rent and royalties in respect of the six years before suit.

From this decree an appeal has now been brought to His Majesty in Council. The appellants, as a new ground of objection in addition to those previously insisted on, have relied upon the fact that the plaintiffs agreed to exclude from the sale the interest of certain sub-lessees, and say that in any case the property which was included in the decree for sale was neither "the mortgaged property nor a sufficient part thereof" within the meaning of Rule 5 (3) of Order 34. Whether upon this new ground the appellants could resist a personal decree for the deficiency under Rule 6 of that Order, is however a question which their Lordships do not find it necessary to discuss or decide.

Since the decision of the High Court in this case, the position of a mortgagee of leaseholds has been considered by the Board in *Ram Kinkar Banerjee v. Satya Charan Srimani* (1938) L.R. 66 I.A. 50. It was there held that in India even in the case of an English mortgage a legal interest remains in the mortgagor: hence the interest taken by the mortgagee is not an absolute interest and

is not such as to render him liable for the burdens of the lease by reason of privity of estate. In that case however the mortgagees had not entered into possession of the properties mortgaged.

In the present case no question arises of novation by reason of the appellants having paid rent to the Raj or otherwise. Their Lordships have however to consider whether the appellants have become liable for the rents and royalties by reason of their entry into possession of the mortgaged property. They are not of opinion that privity of estate can result from entry into possession in the case of a person who has taken a transfer from the lessee of an interest which is not the whole interest in the term.

The High Court were of opinion that the appellants were liable by reason of privity of contract and in support of this view cited Dallas C.J. in *Williams v. Bosanquet* (1819) 1 Brod. [and] B. 238, at 263:

and, even as to privity of contract, there is such privity also, for the contract of the lessor is with the lessee and his assigns, and the defendants here are the assigns of the lessee: it is therefore a contract between the lessor and the assignee, that is, in this case, between the plaintiff and the defendants.

Before relying upon this *dictum* it would be necessary to enquire whether the principle which it expresses has been accepted in the law of England and how it consists with the doctrine, generally accepted, that the assignee's liability to the lessor can be brought to an end by his assigning the premises over to another. But in their Lordships' view the principle of the decision in *Ram Kinkar Banerjee's case* (*supra*) is inconsistent with there being privity of contract between the lessor and the mortgagee in respect of the rent and lessee's covenants. If the lessee retains part of his original interest in the term the mortgagee cannot be liable to the lessor for the whole of the rent and covenants; and cannot without apportionment be liable for any part thereof, whether or not he enters into possession. The transferee of a partial interest in the term cannot be taken to have promised the lessor to discharge any part of the burdens of the lessee. It would be somewhat remarkable if the lease in *Ram Kinkar's case* was not thought to be one in which "the contract is with the lessee and his assigns"; yet no suggestion is to be discovered to the effect that the mortgagees were liable by privity of contract. Their Lordships are of opinion that the principle of that decision is equally inconsistent with privity of contract as with privity of estate as a ground of claim against the mortgagee of leaseholds in such a case as the present.

They will humbly advise His Majesty that this appeal be allowed, the decree of the High Court dated 18th February, 1938, set aside and that of the Subordinate Judge dated 6th December, 1934, restored. The first respondent will pay the appellants' costs in the High Court and of this appeal.

In the Privy Council

THE JAGADAMBA LOAN COMPANY,
LIMITED

2.

RAJA SHIBA PRASAD SINGH AND
OTHERS

DELIVERED BY SIR GEORGE RANKIN

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